FILE COPY

Supreme Court, U.S.
FILED
JAN 2 1943
CHARLES ELMORE CROPLEY
CLERK

No. 399

In the Supreme Court of the United States

OCTOBER TERM, 1942

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statutes involved	2
Statement	2
Specification of errors to be urged	7
Summary of argument	8
Argument:	
I. The United States is immune from State regulation of the price term of its purchase contracts	9
A. The States have no power to regulate the activities of the Federal Government	10
B. The decisions of this Court concerning intergovernmental tax immunity also show that the price regulation is invalid because its incidence is on the United States	22
II. The Pennsylvania regulation is inconsistent with federal law regulating purchases by the United States and therefore cannot constitutionally apply to such purchases	31
A. Federal competitive bidding statutes	31
B. Procedure under the War Powers Act	37
Conclusion	39
Appendix	40

CITATIONS

Cases:	
Alabama v. *King & Boozer*, 314 U. S. 1	7, 10, 15, 20, 23, 26, 27, 29, 30
Alward v. *Johnson*, 282 U. S. 509	23
Arizona v. *California*, 283 U. S. 423	16
Ashton v. *Cameron County District*, 298 U. S. 513	10
Baldwin v. *Seelig*, 294 U. S. 511	21
Baltimore and Annapolis Railroad Co. v. *Lichtenberg*, 176 Md. 383, appeal dismissed, *sub nom. United States* v. *Baltimore & Annapolis R. Co.*, 308 U. S. 525	17, 21
Baltimore National Bank v. *Tax Commission*, 297 U. S. 209	25
Bank of Commerce v. *New York City*, 2 Black. 620	24
Brush v. *Commissioner*, 300 U. S. 352	23
Burnet v. *Coronado Oil & Gas Co.*, 285 U. S. 393	23

Cases—Continued. Page

Clallam County v. *United States*, 263 U. S. 341 25
Cloverleaf Butter Co. v. *Patterson*, 315 U. S. 148 31
Collector v. *Day*, 11 Wall. 113 23
Colorado Bank v. *Bedford*, 310 U. S. 41 ..... 27, 28, 30
Colorado Company v. *Commissioners*, 95 U. S. 259 24
Crandall v. *State of Nevada*, 6 Wall. 35 30
Des Moines Bank v. *Fairweather*, 263 U. S. 103 24
Dobbins v. *Erie County*, 16 Pet. 435 23
Educational Films Corp. v. *Ward*, 282 U. S. 379 ..... 25, 29
Evans v. *Gore*, 253 U. S. 245 23
Federal Land Bank v. *Bismarck Co.*, 314 U. S. 95 ..... 11, 15, 30
Federal Land Bank v. *Crosland*, 261 U. S. 374 25
Flint v. *Stone Tracy Co.*, 220 U. S. 107 23
Florida v. *Mellon*, 273 U. S. 12 31
Fox Film Corp. v. *Doyal*, 286 U. S. 123 23
Gillespie v. *Oklahoma*, 257 U. S. 501 23
Graves v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466 ..... 10, 11, 23, 25, 26
Graves v. *Texas Co.*, 298 U. S. 393 23
Helvering v. *Gerhardt*, 304 U. S. 405 ..... 20, 23
Helvering v. *Mountain Producers Corp.*, 303 U. S. 376 23
Home Savings Bank v. *Des Moines*, 205 U. S. 503 24
Hood & Sons, Inc., H. P. v. *United States*, 307 U. S. 588 22
Hunt v. *United States*, 278 U. S. 96 17
Indian Motocycle Co. v. *United States*, 283 U. S. 570 ..... 23, 24
Irwin v. *Wright*, 258 U. S. 219 24
James v. *Dravo Contracting Co.*, 302 U. S. 134 ..... 23, 24, 25
Jewel Tea Co. v. *State Tax Commissioner*, 70 N. D. 229 28
Johnson v. *Maryland*, 254 U. S. 51 ..... 10, 11, 15, 16, 17
Lawrence v. *State Tax Comm.*, 286 U. S. 276 29
Lee v. *Osceola Imp. Dist.*, 268 U. S. 643 25
Liggett & Myers Co. v. *United States*, 299 U. S. 383 24
Long v. *Rockwood*, 277 U. S. 142 23
Macallen Co. v. *Massachusetts*, 279 U. S. 620 ..... 23, 25
Maricopa County, Arizona v. *The Valley National Bank*, No. 449, this term 25
Matter of Heff, 197 U. S. 488 11
McCulloch v. *Maryland*, 4 Wheat. 316 ..... 10, 20, 25, 30
McGoldrick v. *Berwind-White Co.*, 309 U. S. 33 ..... 28, 30
Miles v. *Graham*, 268 U. S. 501 23
Milk Control Board v. *Gosselin's Dairy, Inc.*, 301 Mass. 174 17
National Bank v. *Commonwealth*, 9 Wall. 353 30
National Life Ins. Co. v. *United States*, 277 U. S. 508 24
New Brunswick v. *United States*, 276 U. S. 547 25
N. Y. ex rel. Rogers v. *Graves*, 299 U. S. 401 23
Northern Pacific R. R. Co. v. *Traill County*, 115 U. S. 600 24
Northern Securities Co. v. *United States*, 193 U. S. 197 31
Ohio v. *Thomas*, 173 U. S. 276 ..... 11, 16

Cases—Continued. Page

O'Malley v. *Woodrough*, 307 U. S. 277 23
Osborn v. *United States Bank*, 9 Wheat. 738 ..... 11, 15, 25
Pacific Coast Dairy, Inc. v. *Department of Agriculture of the State of California*, 19 Cal. (2d) 818, pending on appeal, No. 275, this Term 17, 18, 35
Pacific Co. v. *Johnson*, 285 U. S. 480 23
Panhandle Oil Co. v. *Knox*, 277 U. S. 218 23
Pittman v. *Home Owners' Loan Corp.*, 308 U. S. 21 30
Pollock v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601 23
Roach v. *Philadelphia County* 24
Schneider v. *United States*, 19 C. Cls. 547 33
Schuylkill Trust Co. v. *Pennsylvania*, 302 U. S. 506 24
Scott v. *United States*, 44 C. Cls. 524 32
Society for Savings v. *Coite*, 6 Wall. 594 24
Stahmann v. *Vidal*, 305 U. S. 61 27
Stewart & Co. v. *Sadrakula*, 309 U. S. 94 17
Tanner v. *State*, 190 So. 292 29
Telegraph Co. v. *Texas*, 105 U. S. 460 24
Thomson v. *Pacific Railroad*, 9 Wall. 579 11
United States v. *Brookridge Farm, Inc.*, 111 F. (2d) 461 ..... 33, 34
United States v. *Ellicott*, 223 U. S. 524 33
United States v. *Portland* 24
United States v. *Purcell Envelope Co.*, 249 U. S. 313 33
United States v. *Rickert*, 188 U. S. 432 24
United States v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 22
United States v. *Snyder*, 149 U. S. 210 16
United States v. *Summerlin*, 310 U. S. 414 16
United States v. *Wrightwood Dairy Co.*, 315 U. S. 110 22
Van Brocklin v. *State of Tennessee*, 117 U. S. 151 24
Weston v. *City Council of Charleston*, 2 Pet. 449 11
Wheeler Lumber Co. v. *United States*, 281 U. S. 572 23
Williams v. *Talladega*, 226 U. S. 404 24
Wisconsin v. *J. C. Penney Co.*, 311 U. S. 435 ..... 12, 29
Wisconsin Railroad Co. v. *Price County*, 133 U. S. 496 24

Federal Statutes:
U. S. Constitution:
Art. I, Sec. 8, cl. 11 ..... 20, 40
Art. VI 10, 31, 40
Rev. Stat. § 3709 ..... 32, 40
Rev. Stat. § 5219 25
Act of July 5, 1884, c. 217, 23 Stat. 109, as amended 32, 41
Act of March 2, 1901, c. 803, 31 Stat. 905, as amended 32, 42
Motor Carrier Act, 1935, 54 Stat. 899, Sec. 218 36
Act of March 20, 1936, c. 160, 49 Stat. 1185 25
First War Powers Act, 1941, 55 Stat. 838:
Title II 31, 37

State Statutes:

Act No. 103, P. L. 417, April 28, 1937, as amended by Act No. 177, P. L. 443, July 24, 1941:

	Page
Secs. 101 *et seq.*	2, 42
Sec. 103	13, 43
Sec. 401	14, 43
Sec. 404	43
Sec. 406	5
Secs. 401–406	29
Secs. 701–702	29
Sec. 801	38, 44
Sec. 802	12, 3, 46
Sec. 803	46
Sec. 804	46
Sec. 805	47
Sec. 807	12, 13, 48
Secs. 1001–1002	12, 14
Penn Stat. Ann. (Purdon 1930, supp.), Tit. 31, §700j–101 *et seq.*	2, 13, 21, 38, 48, 49
N. Y. L. 1934, c. 126	22
N. Y. L. 1937, c. 383, 876	22

Miscellaneous:

22 Op. Atty. Gen. 1	32
38 Op. Atty. Gen. 452	33, 36
39 Op. Atty. Gen. 71	34
39 Op. Atty. Gen. 93	34
Executive Order No. 9001, December 27, 1941 (6 F. R. 6787)	37, 38
Executive Order Nos. 9023, 9055, 9058, 9116, 9219, 9221, 9223, 9241	38
Lemke, *Legislative Price-Fixing and the Competitive Bidding Requirement in Government Contracts* (1940), 8 Geo. Wash. L. Rev. 935	34

In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 399

PENN DAIRIES, INC., AND THE UNITED STATES OF AMERICA, APPELLANTS

v.

THE MILK CONTROL COMMISSION OF THE COMMONWEALTH OF PENNSYLVANIA

APPEAL FROM THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The findings and order of the Milk Control Commission of Pennsylvania (R. 34–39) and the opinion and judgment of the Court of Common Pleas of Lancaster County, Pennsylvania (R. 56–66) are not reported. The opinion of the Superior Court of Pennsylvania (R. 79–85) and the dissenting opinion (R. 85–87) are reported in 148 Pa. Super. 261. The opinion of the Supreme Court of Pennsylvania (R. 94) is reported in 344 Pa. 635.

JURISDICTION

The judgment of the Supreme Court of Pennsylvania was entered May 25, 1942 (R. 94). The joint appeal was taken on July 27, 1942, and allowed on August 8, 1942 (R. 94–95). This Court noted probable jurisdiction on October 26, 1942 (R. 98). The jurisdiction of this Court rests on Section 237 (a) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the minimum prices for purchases or sales of milk, established under the Pennsylvania Milk Control Law, may be applied to sales of milk by a distributor to the United States.[1]

STATUTES INVOLVED

The applicable portions of the constitutional provisions and statutes involved are set forth in the Appendix.

STATEMENT

The Pennsylvania Milk Control Law of April 28, 1937,[2] establishes a Milk Control Commission

[1] No question is raised as to the right of Pennsylvania to fix prices at the producer-distributor level for milk which ultimately is sold to the United States.

[2] Act No. 105, P. L. 417, §§ 101 *et seq.*; Penn. Stat. Ann. (Purdon 1930, supp.), Tit. 31, §§ 700j–101 *et seq.* This statute was amended on July 24, 1941 (Act No. 177, P. L. 443), more than four months after this proceeding was instituted before the Milk Control Commission, but the basic structure and purpose of the statute were left untouched. Reference will hereafter be made to the only amendment relevant to this case.

(§ 201) with authority to fix prices for milk (§§ 801–803), including minimum wholesale and retail prices for milk sold by milk dealers to consumers (§ 802), and to issue rules, regulations, and orders to effectuate this authority (§ 307). In the fall of 1940 the United States established under a permit from the Commonwealth of Pennsylvania (R. 32–33) a large military encampment on lands belonging to the Commonwealth at Indiantown Gap, Dauphin County, Pennsylvania. On or about February 1, 1941, the purchasing and contracting officer of the Quartermaster of the United States Army at Indiantown Gap Reservation invited bids for the supply of milk for the period from March 1 to June 30, 1941, for consumption by the troops maintained at the camp. (R. 34–36, 51.) On February 4, 1941, the Milk Control Commission sent a notice to all known interested parties, including appellant Penn Dairies, Inc., addressed "To All Milk Dealers Interested In Submitting Bids to Furnish Milk to the United States Government at Indiantown Gap, Penna. During the Period from March 1 to June 30, 1941 inclusive" (R. 10, 11). The notice was accompanied, for the dealer's "information and guidance," with a copy of the Commission's Official General Order No. A–14. Section 4 (b) of that order prescribed "the minimum wholesale prices to be charged by or paid to milk dealers." The notice announced that the unit prices specified in Section 4 (b) of the

price order should be considered in the preparation of bids, and—

> Any purchases or sales of milk made or offers to buy or sell milk at prices below the prescribed minimum prices of effective Official General Orders of this Commission are construed as violations of the Milk Control Law.
>
> The Milk Control Commission expects compliance with its orders, rules, and regulations, and will appreciate your cooperation in this matter. (R. 11–13.)

Appellant Penn Dairies, Inc., a Pennsylvania corporation doing business as a milk dealer and having its principal office in Pennsylvania, submitted a bid offering to sell to the United States 135,000 one-quart bottles of milk at $.079 per bottle, and 540,000 half-pint bottles of milk at $.0215 per bottle (R. 14, 36). These prices were below those designated by the Milk Control Commission, $0.095 and $0.025, respectively (R. 23–31, 38). By War Department Purchase Order dated March 1, 1941, the contract was awarded to Penn Dairies as the lowest of several bidders, and milk deliveries were made thereunder (R. 10, 14, 38, 54–55).

On March 5, 1941, the Milk Control Commission pursuant to Section 404 of the Milk Control Law issued a citation to Penn Dairies to show cause why its application for a milk dealer's license for the year commencing May 1, 1941, should not be refused on account of such sale and delivery below

the minimum prices fixed by General Order A–14 (R. 7–14). The answer of Penn Dairies denied the jurisdiction of the Commission to regulate prices charged to the United States, and attacked the price order on other grounds not here involved (R. 13–16). After a hearing (R. 19–33), the Commission denied Penn Dairies' license application on account of its offer to sell and its sale of milk to the United States at prices below those fixed by the Commission. The Commission held that the price order as applied to this transaction was valid. (R. 34–39.)

Penn Dairies appealed the Commission's order to the Court of Common Pleas of Lancaster County, raising the federal constitutional question, among others (R. 40–42).[2] Thereafter, with leave of the President Judge, the United States filed a suggestion of interest and intervened, asserting that the Commission was without lawful authority or power to fix or regulate the minimum prices

[2] With that appeal and each subsequent appeal there has been granted a *supersedeas* staying all proceedings under the Commission's order until final disposition of the appeal (R. 43). Under Section 406 of the Pennsylvania Milk Control Law, the effect of an appeal and *supersedeas* is to prevent the Commission, pending the appeal, from refusing future licenses as a result of the violation involved in the appeal. By reason of the orders of *supersedeas* the Commission, acting under Section 406, has successively issued conditional licenses to Penn Dairies for the years beginning May 1, 1941, and May 1, 1942, which are by law automatically cancelled five days after the termination of the litigation favorably to the Commission.

to be charged by milk dealers in selling milk to the United States (R. 47–56). The Court of Common Pleas held that the Milk Control Law was intended to apply to sales of milk to the United States; that the defense of federal immunity from state regulation was not available to Penn Dairies; and that there is no conflict between the state price law as thus applied and the federal competitive bidding statutes (R. 56–66). The court's judgment, rendered on July 25, 1941, sustained the Commission's order refusing Penn Dairies a milk dealer's license (R. 66).

The judgment of the Court of Common Pleas was affirmed by the Superior Court (R. 79–85),* and later by the Supreme Court of Pennsylvania (R. 94). Before both courts, Penn Dairies and the United States (which has participated continuously in the litigation since intervening) urged that the State Milk Control Law and the Commission's price orders could not constitutionally be applied to sales of milk to the United States (R. 74–78, 87–94). Both courts held, however, the Supreme Court adopting the opinion of the Superior Court, that the Milk Control Law and the Commission's price-fixing order thereunder were applicable to sales to the United States; and that such application did not impose an unconstitu-

*One judge dissented on the ground that the Commission had issued no price order applicable to sales to the United States (R. 85–87).

tional burden on the United States because "the incidence of the law" was upon milk dealers and its effect upon the Government was only incidental. Both courts considered it immaterial, in view of this Court's decision in *Alabama* v. *King & Boozer*, 314 U. S. 1, that the increased cost, resulting from the minimum price, was passed on directly to the United States. The courts below also held that the order did not interfere with the federal competitive bidding statutes. (R. 79-85, 94.)

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Pennsylvania erred:

1. In holding that the incidence of the Milk Control Law was only upon milk dealers and not also upon purchasers of milk.

2. In holding that the application of the minimum price regulation to purchases by the United States constituted a constitutional exercise of state authority.

3. In holding that the application of the minimum price regulation to purchases by the United States did not conflict with federal competitive bidding statutes.

4. In holding that the State Milk Control Commission properly refused to issue a milk dealer's license to Penn Dairies on account of its sales of milk to the United States at prices below the minimum fixed by the Commission.

5. In affirming the judgment of the Superi Court.

SUMMARY OF ARGUMENT

I

As applied to purchases of milk by the United States, the Pennsylvania Milk Control Law is unconstitutional. A state may not regulate the United States in the performance of its governmental functions notwithstanding that the attempted regulation is by a nondiscriminatory statute of general application. A regulation of the price at which the seller may sell fixes a term of the contract of sale and purchase, and therefore is a direct regulation of the terms on which the buyer must buy, even though he is not named in the law. The legal incidence of the law is on the buyer as immediately and fully as if it were formally addressed to him. Consequently, where the United States is the buyer, application of the Milk Control Law to the sale is an attempt to regulate the governmental activities of the United States and is forbidden by the federal constitution.

This conclusion is confirmed by the cases dealing with intergovernmental immunity from taxation. The instant case is to be distinguished from a tax collected from a seller who deals with the United States but who, so far as the law is concerned, may absorb any part of the tax. The instant case is analogous to the situation which would be presented if a state levied a sales tax on sales to the United States and required the seller to pass the tax on to the buyer. And it has never been

doubted that, even in the absence of an express prohibition by Congress, such a tax would be invalid as applied to sales to the United States.

II

The Pennsylvania Milk Control Law conflicts with the procurement policy established by Congress in the competitive bidding statutes. The purpose of those statutes is to secure the lowest economically possible price, and to prevent favoritism in the award of contracts by requiring the award to be made to the lowest responsible bidder. Minimum price laws are intended to, and do, keep prices above competitive levels. Application of the Milk Control Law therefore would frustrate the purposes of the federal statutes, and since the two are inconsistent, the former must, under the Constitution, yield supremacy to the latter.

ARGUMENT

I

THE UNITED STATES IS IMMUNE FROM STATE REGULATION OF THE PRICE TERM OF ITS PURCHASE CONTRACTS

In upholding the validity of the order of the Milk Control Commission, the court below did not advert to the decisions of this Court dealing with state regulation as distinct from state taxation. Referring to the tax cases, it held that the incidence of the state price law was upon the milk

dealers only and cited *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, and *Alabama* v. *King & Boozer*, 314 U. S. 1, as supporting its conclusion. We submit, however, that the controlling principles are those developed in the decisions dealing with the immunity of the federal government from state *regulation* and that the application of such principles requires reversal of the decision below. Since, however, the decisions concerning federal immunity from state taxation may furnish appropriate analogies [5] we shall also show that the cases relied upon by the court below do not support its conclusion but in fact give additional strength to our position that the State Milk Control Law may not under the Constitution be applied to purchases by the United States.

A. THE STATES HAVE NO POWER TO REGULATE THE ACTIVITIES OF THE FEDERAL GOVERNMENT

The immunity of the national government from regulation by state law is beyond question. When the dual system of government results in conflict between state regulation and federal activities, the former must yield under the supremacy clause of Article VI, for, as stated by Chief Justice Marshall in *McCulloch* v. *Maryland*, 4 Wheat. 316, 427:

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power

[5] See e. g., *Johnson* v. *Maryland*, 254 U. S. 51; *Ashton* v. *Cameron County District*, 298 U. S. 513.

> vested in subordinate governments, as to exempt its own operations from their own influence. * * *

The constitutional prohibition against state action regulating the activities of the federal government, frequently reiterated in the opinions of this Court,[6] is coextensive with the scope of federal functions, for every activity of the United States is an exercise of its governmental power (see *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477; *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95).

This is conceded here; likewise, there is, of course, no question but that the purchase of supplies for the Army is a legitimate federal activity. The inquiry, therefore, is whether the minimum price order applied to purchases of milk by the United States is an attempt by the state to regulate the federal government or its functions. The court below apparently concluded that only the milk dealer was regulated because "no attempt is made in the law or in the Order of the Board to give any order or direction to the [federal] Reservation or its officers" (R. 84). But this characterization of the state law, which we assume to be a conclusive interpretation of the law, cannot foreclose this Court from determining independently whether the

[6] See e. g., *Osborn* v. *United States Bank*, 9 Wheat. 738; *Weston* v. *City Council of Charleston*, 2 Pet. 449; *Thomson* v. *Pacific Railroad*, 9 Wall. 579, 590–591; *Ohio* v. *Thomas*, 173 U. S. 276, 283; *Matter of Heff*, 197 U. S. 488, 505; *Johnson* v. *Maryland*, 254 U. S. 51, 55–56.

incidence of the law as thus construed renders it unconstitutional. Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444.

An examination of the Pennsylvania Milk Control Law and of the price order issued thereunder shows that they are in legal and practical effect regulations of the sale and purchase of milk, and therefore, as here applied, are attempts to regulate purchases by the United States. Section 802 directs the Milk Control Commission to—

> fix, by official order * * * the minimum wholesale and retail prices * * * to be charged for milk sold within any milk marketing area of the Commonwealth, whereso-ever produced * * *.

And Section 807 provides that

> After the commission shall have fixed prices to be charged or paid for milk * * * it shall be unlawful for a milk dealer or producer to sell or buy * * * milk at any price below the minimum price * * * applicable to the particular transaction.

Sections 1001 and 1002 provide for penalties to be imposed upon "any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made." Administrative recognition that the statute imposes obligations upon purchasers as well as sellers is to be found in Section 4 of the Commission's Milk Control Order A–14 (R. 27), which the court below held to be applicable here:

> The following shall be the minimum Retail and Wholesale prices *charged by or paid to milk dealers* for fluid milk, skim milk, buttermilk, flavored milk and milk drink sold in bottles or other containers in Area 11. [Italics ours.]

And the 1941 amendments to the Milk Control Law remove any ambiguity that may have existed as to the impact of the regulation[7] by expressly forbidding any person to buy milk at less than the minimum price. Thus, the Pennsylvania law plainly recognizes the obvious truth that the regulation of the price term of a contract is unavoidably a regulation of buyer and seller alike. The statute and price orders of the commission are equivalent, therefore, in the circumstances here considered, to a direction to the United States not to purchase milk in Pennsylvania at prices below those specified by state authorities.

But even if we assume that the state price regulation is formally addressed to the milk dealer alone, nevertheless direct interference with the

---

[7] Section 802 was amended specifically to authorize the commission to fix prices to be "received by milk dealers or handlers for milk sold" as well as prices "to be charged." Section 807 made it unlawful for "any other person" as well as a milk dealer, handler or producer to "buy or receive milk at any price below the minimum price * * * applicable to the particular transaction." And to make certain of the statute's application to governmental purchasers, the definition of "consumer" under Section 103 was amended to include "governmental persons." Act of July 24, 1941 (Act No. 177, P. L. 443, 31 P. S. §§ 700j–103, 802, 807).

federal function is its inescapable legal concomitant. What no dealer may sell at less than the minimum prices the United States cannot buy below such prices. This results from the consensual nature of a contract to sell.

In the instant case, for example, when the United States made public its desire to purchase milk and invited competitive bids, the Commission notified prospective bidders that an offer to sell or a sale of milk to the United States below the prescribed minimum prices would be construed as a violation of the State Milk Control Law. And after a contract was executed between the United States and Penn Dairies at a mutually satisfactory price, but below the state-prescribed minimum, the Commission refused, solely on that account, to renew Penn Dairies' license as a milk dealer, thus preventing it from continuing in business without incurring penalties (Milk Control Law, Secs. 401, 1001, 1002). If such action is valid no milk dealers in Pennsylvania can make any offer to the United States at a price below the minimum specified by the State Commission and continue in business; consequently, the United States will be effectively prevented from contracting for the purchase of milk at prices below such minimum. Contracts being consensual, the regulation of the price to be charged by the dealer *to* the United States is synonymous with a regulation of the price to be paid for milk *by* the United States in all its purchases. That the enforcement provisions of the

statute are aimed exclusively at the seller does not prevent the conclusion that the legal impact of the regulation is also upon the purchaser. Cf. *Federal Land Bank* v. *Bismarck Co.*, 314 U. S. 95; *Alabama* v. *King & Boozer*, 314 U. S. 1, and see pp. 29–30, *infra*.

It is clear, therefore, that the price regulation must fall as an interference with a governmental activity of the United States. The Court has several times recognized that so vital a federal function as the purchase of supplies for the armed forces is within the protection of the constitutional immunity. In *Johnson* v. *Maryland*, 254 U. S. 51, 56, the Court cited army procurement as an unquestionable example of a federal activity which the states could not constitutionally regulate, quoting the *dictum* of Chief Justice Marshall in *Osborn* v. *United States Bank*, 9 Wheat. 738, 867:

> Can a contractor for supplying a military post with provisions, be restrained from making purchases within any state, or from transporting the provisions to the place at which the troops were stationed? or could he be fined or taxed for doing so? We have not yet heard these questions answered in the affirmative. It is true, that the property of the contractor may be taxed, as the property of other citizens; and so may the local property of the bank. But we do not admit, that the act of purchasing, or of conveying the articles purchased, can be under state control. * * *

And *Ohio* v. *Thomas*, 173 U. S. 276, held that a state law requiring the display of a placard where oleomargarine was served could not be applied to a federal soldiers' home at which such food was furnished to inmates. Those decisions seem conclusive here.

Comparison of the purchase of milk for an army camp with the many other types of federal activity excluded from state control confirms this conclusion. In constructing a dam and reservoir authorized by Congress, the Secretary of the Interior cannot be required by state statute to secure approval of the plans and specifications by the state engineer, because "The United States may perform its functions without conforming to the police regulations of a State" (*Arizona* v. *California*, 283 U. S. 423, 451). A lien upon real estate in favor of the United States for taxes due under the internal revenue law is enforcible without compliance with a state law requiring recordation and timely enforcement (*United States* v. *Snyder*, 149 U. S. 210). Nor will an obligation owed to the United States be debarred from presentation against a decedent's estate because not filed within the time specified by state law (*United States* v. *Summerlin*, 310 U. S. 414). The driver of a mail truck for the United States Post Office Department cannot be required to comply with state licensing requirements (*Johnson* v. *Maryland*, 254 U. S. 51,

56),[8] nor can federal agents in a national forest and game preserve be subjected to the hunting restrictions promulgated by the state in which the preserve is located (*Hunt* v. *United States*, 278 U. S. 96).[9]

Appellee, in its Statement Opposing Jurisdiction and Motion to Dismiss or Affirm, argued that the price order may be applied to purchases for the United States because it is not discriminatory. That view has been approved in several state cases; e. g., *Milk Control Board* v. *Gosselin's*

---

[8] The Court in the *Johnson* case regarded the state regulation as seeking to impose upon drivers qualifications for Government service "in addition to those that the Government has pronounced sufficient." Compare, however, *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, which upheld a state requirement of a certificate from an independent contractor engaged solely in the carrying of passengers for the federal government. This Court dismissed the appeal "for want of a substantial federal question" (*sub nom. United States* v. *Baltimore & Annapolis R. Co.*, 308 U. S. 525). Later, the Court referred to that case as holding that the safety requirements of a state may be applied to trucks of an independent contractor transporting government employees under a contract with the United States. See *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 104. It should be noted that the regulation involved in the *Lichtenberg* case did not inevitably fall upon the United States but upon the contractor in his business.

[9] The Court's opinion in the *Hunt* case did not advert to the question whether the federal government had exclusive jurisdiction over the game preserve. In *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of the State of California*, No. 275, this Term, the Government's brief as *amicus curiae* discusses the application of the California price-fixing law to sales of milk to the United States upon a military reservation subject to exclusive federal jurisdiction.

Dairy, Inc., 301 Mass. 174; *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of the State of California*, 19 Cal. (2d) 818, pending on appeal as No. 275, this Term. But whatever may be the propriety of the test of discrimination in determining the validity of State tax laws applied to persons dealing with the United States, the decisions cited above (pp. 15–17, *supra*) make it clear that the test has no application to sustain the validity of a direct regulation of the activities of the United States itself. The State regulations which, as applied to the United States, were held unconstitutional were general statutes applicable to all persons within the jurisdiction of the State; and we shall show below that the cases dealing with State taxation do not sustain nondiscriminatory taxes whose direct legal incidence is upon the United States. In view of this continuous course of decisions pointing out that the States could not regulate the procurement of Army supplies, it cannot be supposed now that the failure of Congress expressly to forbid State regulation of procurement signifies a desire that the federal procurement officers should comply with nondiscriminatory state laws. Under those decisions, therefore, the Milk Control Law, and the Commission's orders thereunder, cannot be applied, in the absence of consent by Congress, to the purchase by the United States of its essential supplies.

As a matter of principle, too, it is immaterial that the State law is not discriminatory. The question

at hand concerns the distribution of the powers of government; it is, does the Constitution place the power in the States to fix the terms on which milk shall be purchased for the Army. Concededly, it might be sound policy and in the national interest for the federal government to require federal procurement officers, when they enter a state to purchase such supplies, to conform to state laws designed to effectuate reasonable local policies, particularly if the only effect of compliance is increased cost. On the other hand, it might be judged preferable from the viewpoint of the nation that federal procurement officers should give no effect to the diverse State programs, which may be based on considerations of local interest not consistent with national policy. But the choice between these alternatives, it is submitted, and the issuance of appropriate directions to the procurement officers by Congress or other authority are questions of policy with which the Court has no concern. Its province in the matter would seem clearly to be limited to the determination whether the Constitution vests in the States any power to give directions to the federal government as to the price it shall pay for supplies procured for the Army by its procurement officers as the result of negotiations between such officers and the citizens of the State. We submit that the states have surrendered that power to the national government. The Constitution reflects the determination of the Founders that the procurement of supplies for the Army is a mat-

ter of national concern to be regulated by the elected or appointed representatives of all the people and not to be controlled by single States in their local interests;[10] it vests the power "To raise and support Armies" in Congress and not in the states (U. S. Const., Art. I, Sec. 8, cl. 11). When Congress has not itself determined what prices federal procurement officers shall pay for necessary supplies, or established any policy in that regard for the Executive Department to follow, but has simply charged the Executive Department with the duty of procurement, then, we submit, Congress, in the exercise of the federal government's exclusive power over the Army, has remitted such questions of national policy not to the states for decision upon local considerations, but to the Executive Department, which in the exercise of the delegated power must determine whether to purchase supplies at prices conforming to state regulations or whether to obtain the lowest possible prices.

It is no answer to say that the states have retained their police powers and may, unless Congress forbids, exercise such powers even though the exercise affects the federal government. We assume that that is so, and that a state may, in the silence of Congress, regulate the conduct of its citizens in such a way that the economic repercussions of the regulation substantially affect the federal government. Cf. *Alabama* v. *King & Boozer*, 314

---

[10] Cf. *McCulloch* v. *Maryland*, 4 Wheat. 316, 435–436; *Helvering* v. *Gerhardt*, 304 U. S. 405, 412.

U. S. 1; *Baltimore and Annapolis Railroad Co.* v. *Lichtenberg*, 176 Md. 383, appeal dismissed, 308 U. S. 525. In like manner the states may, in the silence of Congress, exercise their police powers in appropriate cases even though interstate commerce is affected. But where, as we have shown to be true here, the legal incidence of the regulation is on the United States because the state law itself fixes for local economic reasons the terms on which the United States may come into the state and purchase Army supplies from its citizens, then the state law passes beyond the life of local affairs and becomes a direct regulation of the United States and of the support of the Army. In like manner, a state regulation fixing the terms on which out-of-state goods may come into the state is a regulation of interstate commerce and therefore unconstitutional, even though it is not discriminatory and is in furtherance of a reasonable state policy (cf. *Baldwin* v. *Seelig*, 294 U. S. 511). In both cases the state law is invalid because it endeavors to exercise a power that the Constitution vested in the federal government exclusively because the questions of policy involved in its exercise are of national rather than local importance.[11]

[11] Even if pertinent, there is nothing to indicate that exclusion of federal purchases from the minimum price regulations would frustrate the objective of the state law, which is to provide an adequate price to the producer of milk in order to secure to the people of Pennsylvania an adequate and wholesome supply of milk (31 P. S., Sec. 700j). In normal times the amount of milk purchased by the federal

B. THE DECISIONS OF THIS COURT CONCERNING INTERGOVERNMENTAL TAX IMMUNITY ALSO SHOW THAT THE PRICE REGULATION IS INVALID BECAUSE ITS INCIDENCE IS ON THE UNITED STATES

The scope of intergovernmental immunity has been considered most frequently in the numerous cases testing the validity of state tax measures affecting the federal government, its property and its functions. The criteria there developed sustain *a fortiori* our position that the states may not regulate the contracts of the United States. For while the cases in which the benefit of intergovernmental tax immunity is claimed by private persons

---

government would hardly be sufficient to undermine the entire program. In time of war or crisis the increased federal purchases would create a need for fixing maximum rather than minimum prices, as experience has shown to be the case. This is true for two reasons: First, it is the result of the operation of the law of supply and demand. Second, the increased federal purchases normally result in using as fluid milk a greater proportion of the total volume of milk produced, thus diminishing the surplus converted into milk products; it is the surplus that tends to bring down the price received by the producer. Moreover, exclusion of Government milk purchases from the state price-control system would still leave in effect the price maintenance at the producer level in respect of such milk. In the State of New York, the milk price laws impose price control solely at the producer level, concomitant price fixing at the retail level having been abandoned (N. Y. L. 1934, c. 126; N. Y. L. 1937, c. 383 and 876). We are informed by the United States Department of Agriculture that it has found price control at the producer level alone adequate to protect the interests of milk producers. See e. g. *United States* v. *Rock Royal Co-operative, Inc.*, 307 U. S. 533 (New York City Milkshed); *H. P. Hood & Sons, Inc.* v. *United States*, 307 U. S. 588 (Boston Milkshed); *United States* v. *Wrightwood Dairy Co.*, 315 U. S. 110 (Chicago Milkshed).

who deal with the Government exhibit great diversity of reasoning and result,[12] the decisions involving a tax upon the United States, its instrumentalities, property or functions are marked by an unqualified uniformity. This Court has never held that the national government can be taxed by a state or local government in the absence of

---

[12] A number of cases have been expressly overruled. Thus, *Long* v. *Rockwood*, 277 U. S. 142, overruled by *Fox Film Corp.* v. *Doyal*, 286 U. S. 123; *Gillespie* v. *Oklahoma*, 257 U. S. 501, and *Burnet* v. *Coronado Oil & Gas Co.*, 285 U. S. 393, overruled by *Helvering* v. *Mountain Producers Corp.*, 303 U. S. 376; *The Collector* v. *Day*, 11 Wall. 113, and *N. Y. ex rel. Rogers* v. *Graves*, 299 U. S. 401, overruled in *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; cf. *Evans* v. *Gore*, 253 U. S. 245, and *Miles* v. *Graham*, 268 U. S. 501, apparently overruled by *O'Malley* v. *Woodrough*, 307 U. S. 277. The views expressed in *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218, and *Graves* v. *Texas Co.*, 298 U. S. 393, were said to be no longer tenable to the extent that they differed from those expressed in *Alabama* v. *King & Boozer*, 314 U. S. 1.

Other decisions have been distinguished on grounds so narrow as to cast doubt upon the continuing validity of the earlier holding. Cf., e. g., (1) *Brush* v. *Commissioner*, 300 U. S. 352, with *Helvering* v. *Gerhardt*, 304 U. S. 405; (2) *Dobbins* v. *Erie County*, 16 Pet. 435, with *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466; (3) *Panhandle Oil Co.* v. *Knox*, 277 U. S. 218; *Indian Motocycle Co.* v. *United States*, 283 U. S. 570; and *Graves* v. *Texas Co.*, 298 U. S. 393, with *Alward* v. *Johnson*, 282 U. S. 509; *Wheeler Lumber Co.* v. *United States*, 281 U. S. 572; and *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, with *Pacific Co.* v. *Johnson*, 285 U. S. 480.

In some instances, results have been reached in virtual contradiction of prior cases, albeit without overruling them. Compare, e. g., (1) *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 158 U. S. 601, with *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (and see Justices Brandeis, Holmes, and Stone

Congressional consent.[13] Its sovereign immunity has been given effect whether the tax was levied directly upon property owned by the United States [14]

---

dissenting in *National Life Ins. Co.* v. *United States*, 277 U. S. 508, 527); (2) *Indian Motocycle Co.* v. *United States*, 283 U. S. 570, with *Liggett & Myers Co.* v. *United States*, 299 U. S. 383; (3) *Telegraph Co.* v. *Texas*, 105 U. S. 460, and *Williams* v. *Talladega*, 226 U. S. 404, with *James* v. *Dravo Contracting Co.*, 302 U. S. 134; (4) *Bank of Commerce* v. *New York City*, 2 Black. 620, and *Home Savings Bank* v. *Des Moines*, 205 U. S. 503, with *Society for Savings* v. *Coite*, 6 Wall. 594; *Des Moines Bank* v. *Fairweather*, 263 U. S. 103; and *Schuylkill Trust Co.* v. *Pennsylvania*, 302 U. S. 506.

There is probably no single decision exempting a private taxpayer from a nondiscriminatory tax for reasons of governmental immunity which can with confidence be said to be controlling today.

[13] Two unreported cases affirmed by an equally divided Court at the December Term, 1849, are the only indication that the complete immunity of the United States from tax has ever been seriously questioned by the Court. Their facts are stated in *Van Brocklin* v. *State of Tennessee*, 117 U. S. 151, 175–177. One, *United States* v. *Portland*, resulted in the dismissal of a suit by the United States to recover taxes paid on a customs building; the other, *Roach* v. *Philadelphia County*, affirmed a state court decision that the United States Mint was subject to local taxation. These inexplicable decisions, as pointed out in the *Van Brocklin* case, have no weight as authority.

[14] State or local taxes may not be laid upon such federally owned property as public lands prior to patent or passage of equitable title to private persons (*Colorado Company* v. *Commissioners*, 95 U. S. 259; *Northern Pacific R. R. Co.* v. *Traill County*, 115 U. S. 600; *Wisconsin Railroad Co.* v. *Price County*, 133 U. S. 496, 504; *Irwin* v. *Wright*, 258 U. S. 219), lands held in trust for Indians (*United States* v. *Rickert*, 188 U. S. 432); and even land acquired by the United States to enforce the payment of taxes (*Van Brocklin* v.

or one of its instrumentalities,[15] or was imposed upon a transaction engaged in by the Government or its instrumentality.[16]

The recent decisions of this Court narrowing the scope of intergovernmental tax immunity do not cast doubt upon the complete immunity of the United States from tax. Each of those cases involved a tax on a private taxpayer which he was not obliged by the law to shift to the United States. In none of the cases denying immunity,

---

State of Tennessee, 117 U. S. 151). Nor may lands sold by the United States to a private purchaser be reassessed for the period of federal ownership (*Lee* v. *Osceola Imp. Dist.*, 268 U. S. 643).

[15] *Clallam County* v. *United States*, 263 U. S. 341, 344 (property of wholly-owned Government corporations); *New Brunswick* v. *United States*, 276 U. S. 547 (equitable interest of wholly-owned Government corporation). In *Baltimore National Bank* v. *Tax Commission*, 297 U. S. 209, the Reconstruction Finance Corporation was held subject to state taxation on national bank shares which it held, on the ground that Section 5219 of the Revised Statutes permitted such taxation. The Act of March 20, 1936 (c. 160, 49 Stat. 1185, 12 U. S. C., § 51d), apparently extended to the Reconstruction Finance Corporation a retroactive as well as prospective immunity from such taxation. The constitutionality of its retroactive features is challenged in *Maricopa County, Arizona* v. *The Valley National Bank*, No. 449, this Term.

[16] The recording of a mortgage by the United States is not subject to state tax. See *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 627; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 389; cf. *Federal Land Bank* v. *Crosland*, 261 U. S. 374; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 149, 150; *Graves* v. *N. Y. ex rel. O'Keefe*, 306 U. S. 466, 477. Equally immune are transactions of a federal instrumentality such as a national bank. *Osborn* v. *United States Bank*, 9 Wheat. 738; *McCulloch* v. *Maryland*, 4 Wheat. 316.

including *Graves* v. *N. Y. ex rel. O'Keefe,* 306 U. S. 466, and *Alabama* v. *King & Boozer,* 314 U. S. 1, was the tax imposed upon the sovereign. On the contrary, the opinion in *Alabama* v. *King & Boozer* is based on the underlying assumption that a sales tax the legal incidence of which was on the United States would be invalid. The principal inquiry was whether the state sales tax was imposed by law on the United States or on its contractor, and, having concluded that the tax was imposed on the contractor, the court sustained its validity regardless of the fact that "it is passed on economically." The principle involved in that decision is entirely consistent with its well-settled converse stated above, that if the tax is imposed upon the United States it will be held invalid regardless of whether it is nondiscriminatory and no matter how slight may be its actual burden. The doctrine of the tax cases, therefore, if applied in the field of state regulation, shows to be invalid any law which directly controls or restricts the United States in the performance of a federal function. And it seems clear that the state cannot regulate what it cannot tax, regardless of whether the converse is true.

The court below sustained the Commission's minimum price order by applying the test utilized in *Alabama* v. *King & Boozer*—that is, whether the "legal incidence" of the regulation is upon the contractor or upon the United States. We submit that the court below erred in concluding that the "legal

incidence" of the Milk Control Law was upon the contractor alone within the meaning of this test. If the law provided *in haec verba* that "the United States may not purchase milk in Pennsylvania except at prices fixed by the State Commission"[16], its legal incidence upon the United States would be patent. By fixing the prices which may be charged to the United States, the effect of the Milk Control Law is the same as if the United States itself had been directly addressed by the law. The terms of a contract, which is consensual, cannot be regulated without regulating buyer and seller alike; the "legal incidence" of the regulation is on the agreement and therefore on both parties to it.

This truism distinguishes *Alabama* v. *King & Boozer* from the instant case. There the tax was required by law to be passed on by the seller to the contractor, but nothing in the state law required the contractor to pass it on to the United States.[17] If the contractor had been required by law to collect the tax from the other party to the contract, the latter would have been the taxpayer in law, as "the person ultimately liable for the tax itself."[18] Like a revenue law imposing a tax upon

---

[17] A situation comparable to the *King & Boozer* case would exist if the challenge here were to state regulation of prices to be paid to producers by dealers selling to the United States.

[18] *Colorado Bank* v. *Bedford*, 310 U. S. 41, 52; *Stahmann* v. *Vidal*, 305 U. S. 61. Where the statute demonstrates a clear intention that the purchaser shall pay the tax, im-

the seller which he is required to pass on to the buyer, a regulation fixing the price which the seller must charge as a matter of law forces him to exact that price from the buyer and places the burden on the buyer.

The analogy of the tax cases, therefore, instead of supporting the decision below, actually sustains the proposition that the Pennsylvania milk control law impinges upon federal activities so immediately as to be invalid. In applying the test whether the "legal incidence" of the tax was upon the contractor, the court below placed reliance upon the fact that in the instant case the state law is in terms directed to the seller alone, saying (R. 84):

> No attempt is made in the law or in the Order of the Board to give any order or direction to the [federal] Reservation or its officers. The incidence of the law is upon dealers of milk. Although enforcement of the law against such dealers affects the price of milk to the Reservation as to others, yet that result is in its nature incidental. * * *

But for the reasons stated the failure to mention buyers in the statute cannot conceal the fact that it impinges on them as directly and immediately as if orders were given to them expressly, and

---

mediately or ultimately, its burden is upon the purchaser. Cf. *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33; *Colorado Bank* v. *Bedford*, 310 U. S. 41. State courts, interpreting their own tax statutes, have reached the same conclusion. E. g., *Jewel Tea Co.* v. *State Tax Commissioner*, 70 N. D. 229.

that therefore, in the instant case, its legal incidence is on the United States. (See pp. 12–15, *supra*.) The legal incidence of state laws, and hence their constitutionality, turns upon their operation and not upon any form of words.[19]

Nor would it be material to the essential issue here that no prohibitions and no penalties are levelled at purchasers and that the licensing of milk dealers is the principal instrument for enforcement of the Milk Control Law (see Sections 401–406, 701–702) and the only sanction here invoked. That the impact of the enforcement machinery is not determinative of where the legal burden of the regulation falls has been settled by this Court. In *Alabama* v *King & Boozer, supra,* the state sales-tax statute made the seller the nominal taxpayer and constructed the collection system around him. The law required the seller to collect the tax from the buyer and subjected the seller to penalties, including loss of the right to continue in business, for failure to pay or collect the tax; but it imposed no penalties on the buyer for failure to pay the tax to the seller. Nevertheless, the legal incidence of the tax was held to fall upon the buyer, who ultimately had to pay it.[20] In

[19] Cf. *Wisconsin* v. *J. C. Penney Co.*, 311 U. S. 435, 443–444; *Lawrence* v. *State Tax Comm.*, 286 U. S. 276, 280; *Educational Films Corp.* v. *Ward*, 282 U. S. 379, 387.

[20] This had also been the holding of the State Supreme Court in that case. See also *Tanner* v. *State*, 190 So. 292 (Ala. Ct. App. 1939), affirming a conviction of a seller who had failed to collect the tax from the buyer.

Federal Land Bank v. *Bismarck Co.*, 314 U. S. 95, the sales tax involved was collected by the state from the seller, but constituted a debt from the buyer to the seller. The statute imposed penalties upon a seller for advertising that any part of the tax had been absorbed by him, but no penalties were imposed on the buyer for failure to pay the tax. The North Dakota Supreme Court held the tax to be laid upon the purchaser, and this Court accepted that conclusion, holding that the tax could not apply to sales to the Federal Land Bank in view of its statutory exemption from state taxation. On many other occasions, this Court has recognized that the legal impact of a state tax does not depend on the person from whom it is collected nor the means by which it is enforced.[21]

The price regulation here involved, therefore, does not rest exclusively upon the contractor, as did the sales tax which was upheld in the *King & Boozer* case. The regulation impinges upon the federal government as fully and directly as did the sales tax invalidated in *Federal Land Bank* v. *Bismarck Co.*, which was required by law to be passed on to the purchasing land bank. Accord-

[21] *McGoldrick* v. *Berwind-White Co.*, 309 U. S. 33 (sales tax), and *Colorado Bank* v. *Bedford*, 310 U. S. 41 (tax on services), held the state tax to be imposed on the buyer although collected from the seller. Cf. also *McCulloch* v. *Maryland*, 4 Wheat. 316; *Crandall* v. *State of Nevada*, 6 Wall. 35; *National Bank* v. *Commonwealth*, 9 Wall. 353; *Pittman* v. *Home Owners' Loan Corp.*, 308 U. S. 21.

ingly, the decisions of this Court in tax cases, like the decisions involving state regulations, require reversal of the decision below.

II

THE PENNSYLVANIA REGULATION IS INCONSISTENT WITH FEDERAL LAW REGULATING PURCHASES BY THE UNITED STATES AND THEREFORE CANNOT CONSTITUTIONALLY APPLY TO SUCH PURCHASES

An additional ground for holding the decision below to be erroneous is that Congress has regulated federal purchases in a way essentially inconsistent with the Pennsylvania price regulation. The policy of the federal competitive bidding statutes, and the purchasing procedure adopted under the authorization of Title II of the First War Powers Act, 1941, 55 Stat. 838, cannot be harmonized with the application of the Pennsylvania Milk Control Law to federal purchases. Since Congress undoubtedly has power to regulate the subject, the inconsistent state regulation must yield. U. S. Const., Art. VI; *Northern Securities Co.* v. *United States*, 193 U. S. 197; *Florida* v. *Mellon*, 273 U. S. 12. Cf. *Cloverleaf Butter Co.* v. *Patterson*, 315 U. S. 148.

A. FEDERAL COMPETITIVE BIDDING STATUTES

Long before the enactment of the Pennsylvania Milk Control Law, Congress established a mandatory procedure for the award and execution

of procurement contracts. Under Section 3709 of the Revised Statutes (12 Stat. 220, 41 U. S. C. § 5), "all purchases and contracts for supplies" for any of the Government departments must be made by advertising in advance for proposals (except as otherwise provided by law, or when immediate delivery is required by the public exigency). Similarly, Congress has required that purchases of military supplies (except in cases of emergency or where it is impractical to secure competition or where otherwise provided by law) shall be made after advertisement, and that "the award in every case shall be made to the lowest responsible bidder for the best and most suitable article" (Act of July 5, 1884, c. 217, 23 Stat. 109, as amended; Act of March 2, 1901, c. 803, 31 Stat. 905, as amended; 10 U. S. C. §§ 1200, 1201). Some statutory exceptions to these requirements have been made in the case of small purchases, and in other special circumstances; and recently the First War Powers Act has permitted waiver of the competitive bidding restrictions (see pp. 37–38, *infra*). Nevertheless, the award of procurement contracts to the lowest responsible bidder after advertisement for proposals is generally the required procedure.[22] It was pursuant to that pro-

[22] "The provisions of section 3709 are in the line of a wise public policy, insuring to the Government the advantage of competition in making contracts" (22 Op. Atty. Gen. 1, 6). The agents of the Government are bound to accept the lowest responsible bid or reject all and readvertise. *Scott* v. *United*

cedure that the milk purchase contract here involved was awarded to Penn Dairies as the lowest competitive bidder (R. 47–48, 51–55).

But it is clear that if minimum prices established under state authority bind bidders for Government contracts, there will be no *"lowest* responsible bidder", for where the minimum fixed by state law is above the economic minimum, several bidders will quote the fixed price. Thus, the United States will be denied the full benefit of price competition, which is a prime objective of the bidding laws,[23] whenever minimum prices fixed by law are above the price range under competitive conditions. And since minimum price laws are enacted to prevent low prices resulting from competition, that will generally be the result. An example in point is the bid of Penn Dairies which, although below the fixed minimum price, was economical;[24] and other bids below the minimum, or even below that of Penn Dairies, may

---

States, 44 C. Cls. 524, 527. These provisions are mandatory and contracts made in violation thereof are void. *United States* v. *Ellicott*, 223 U. S. 524, 543; *Schneider* v. *United States*, 19 C. Cls. 547, 551; *cf. United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318.

[23] See *United States* v. *Purcell Envelope Co.*, 249 U. S. 313, 318; *United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10); 38 Op. Atty. Gen. 452, 455.

[24] It was stipulated before the Commission that the profit which Penn Dairies would "realize from the sale of the quantities covered by said contract, if sold at prices fixed by said order, would be a profit materially in excess of any margin of profit necessary to maintain stability in the milk industry" (R. 23).

have been discouraged by the Commission's warning to milk dealers that quotations and sale at less than minimum prices would constitute a violation of the law. Nor is it an answer to say, as did the court below (R. 85) that the state law "does no more than put all bidders on an equal footing with regard to the minimum price." Price competition is the essence of competitive bidding in any true sense.

To subject federal purchases to state price regulation would also be inconsistent with other important purposes of the statutory procurement procedure. Besides securing the lowest competitive price, these laws were intended "to give all persons equal rights to compete for Government contracts" and "to prevent unjust favoritism" (*United States* v. *Brookridge Farm, Inc.*, 111 F. (2d) 461, 463 (C. C. A. 10)). A price level fixed above the potential prices of low-cost milk concerns, for orders of the size usual in the case of Government purchases, will result in many proposals at the minimum figure, thus eliminating the price differential which is the soundest basis for the award to one of several competing bidders and opening the door to the favoritism implicitly condemned by the federal statutes.[25]

---

[25] See Lemke, *Legislative Price-Fixing and the Competitive Bidding Requirement in Government Contracts* (1940), 8 Geo. Wash. L. Rev. 955. If identical bids are received as the result of collusion among the bidders, the purposes of competitive bidding are defeated and all bids may be rejected. 39 Op. Atty. Gen. 71; 39 Op. Atty. Gen. 93.

The court below and the Supreme Court of California in the *Pacific Coast Dairy* case (No. 275, this Term), both relied upon the exception made in the federal competitive biding statutes for cases "where it is impracticable to secure such competition". The latter court also cited "Regulation 5-240 (g) (3)" of the United States Army in support of its proposition that it is impracticable to secure such competition "when the price is fixed by Federal, State, municipal, or other competent authority" (R. 26). But the record in the instant case,[*] shows that provision was not intended, and is not construed by the War Department, either to excuse competitive bidding where a state has fixed prices for the commodity or

[*] In a letter of April 21, 1941, to the Attorney General, the Under Secretary of War expressly rejected any interpretation of paragraph 4 (g) (3) of Army Regulation No. 5-240 (the provision cited by the court below) "as a recognition on the part of the War Department that states and their local governmental units are authorized to fix the prices at which commodities and services can be sold to the United States" and expressly denied the applicability of the regulation "to cases of procurement after advertising," the procedure followed both in the *Pacific Coast Dairy* case and in the case at bar (R. 66-67). The Judge Advocate General of the Army confirmed this construction of paragraph 4 (g) (3), limiting it "to cases where there is only one available source of supply" (R. 71). Indeed, since 1935, "the War Department has consistently taken and maintained the position that price-fixing measures of the states have no application to procurements by the War Department" (R. 72). However, in order to avoid misapprehension (R. 72), paragraph 4 (g) was amended on May 10, 1941, to omit any mention of governmental price fixing (R. 73-74).

service, or to concede the validity of such prices as applied to federal purchases. And the statutory exception shows on its face that it is intended only to cover instances where the agency involved finds it impractical to secure bids for some such reason as that only one source of supply is available; the exception is not intended to delegate to the states power to supersede the general congressional policy.

There are, moreover, other indications that Congress did not intend federal procurement policies established by it to yield to minimum price regulation. Section 218 of the Motor Carrier Act of 1935 requires that contract carriers by motor vehicle file with the Interstate Commerce Commission schedules of minimum charges for transportation in interstate commerce, and prohibits charging rates less than those contained in such schedules. Since the statute was silent as to its applicability to rates to be charged the United States, the Secretary of War requested the Attorney General's opinion on this question. The latter replied that section 218 did not apply to Government contracts, and therefore "contract carriers by motor vehicle may quote to the Government lower rates than those contained in their schedules on file with the Interstate Commerce Commission." (38 Op. Atty. Gen. 452, 456.) The Attorney General based his conclusion in part on the ground that observance of the minimum

price regulation would be contrary to the public policy expressed in the federal competitive bidding statutes. While this is an illustration of federal minimum price regulation, it seems inconceivable that Congress, which did not intend its procurement program to be subjected to a national minimum price policy, nevertheless intended to subject it to the diverse price policies of the states.

B. PROCEDURE UNDER THE WAR POWERS ACT

While the necessities of war have compelled some relaxation of the competitive bidding requirements for public procurement, the Pennsylvania price regulation also conflicts with the emergency methods of purchase. Title II of the First War Powers Act, 1941, 55 Stat. 838, empowers the President to authorize Government agencies exercising functions related to the war effort "to enter into contracts * * * without regard to the provisions of law relating to the making * * * of contracts." By Executive Order No. 9001 of December 27, 1941 (6 F. R. 6787), the President authorized the War and Navy Departments and the United States Maritime Commission to exercise such powers, and provided that in the absence of any other limitation fixed by law—

> the fixed fee to be paid the Contractor as a result of any cost-plus-a-fixed-fee contract entered into under the authority of this

> Order shall not exceed seven per centum of the estimated cost of the contract * * *. (Tit. II, sec. 7)[27]

A minimum price to be charged uniformly by all distributors, regardless of their individual costs, may of course be more than the "cost plus a fixed fee" envisaged by the Executive Order.[28] And since the state law is inconsistent with the federal regulation, the former must yield.

---

[27] The provisions of Executive Order No. 9001 were subsequently extended to contracts of the following agencies: Treasury Department, Department of Agriculture, Federal Works Agency, Panama Canal, Government Printing Office, National Advisory Committee for Aeronautics, Department of the Interior, Tennessee Valley Authority, Office of the Coordinator of Inter-American Affairs, Civil Aeronautics Administration, National Housing Agency, Veterans' Administration, Federal Communications Commission, Office of Scientific Research & Development in the Office for Emergency Management, Federal Prison Industries, Inc., Board of Economic Warfare, Office of Strategic Services, United States Joint Chiefs of Staff. See Executive Orders Nos. 9023, 9055, 9058, 9116, 9219, 9221, 9223, 9241.

[28] The Pennsylvania Milk Control Law requires the Commission to base milk prices "upon all conditions affecting the milk industry in each milk marketing area, including the amount necessary to yield a reasonable return to the producer, which return shall not be less than the cost of production and a reasonable profit to the producer, and a reasonable return to the milk dealer or handler. In ascertaining such returns, the commission shall utilize a cross-section representative of the average or normally efficient producers and dealers or handlers in the area" (Sec. 801, as amended; Penna. Stat. Ann. (Purdon, 1930), Tit. 31, § 700j–801).

CONCLUSION

For the reason that the application of the minimum prices fixed by the Commission under Pennsylvania law to purchases of milk by the federal government constitutes an unauthorized interference with a federal function, and runs counter to national policy as expressed in Acts of Congress, it is respectfully submitted that the decision of the court below should be reversed.

CHARLES FAHY,
Solicitor General.
FRANCIS M. SHEA,
Assistant Attorney General.
DAVID L. KREEGER,
ARCHIBALD COX,
MORTON LIFTIN,
Attorneys.

ARNOLD & BRICKER,
OWEN P. BRICKER,
HARRIS C. ARNOLD,
Attorneys for Penn Dairies, Inc.

DECEMBER 1942

APPENDIX

Pertinent Constitutional and Statutory Provisions

A. *The Federal Constitution*

Article I of the Constitution of the United States provides, in part, as follows:

> Section 8. The Congress shall have Power
>
> * * *
>
> To declare War * * *
> To raise and support Armies * * *
>
> * * * * *
>
> To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.

Article VI of the Constitution provides, in part, as follows:

> This Constitution, and the laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.
>
> * * * * *

B. *Federal statutory provisions*

Section 3709 of the Revised Statutes of the United States, derived from the Act of March 2, 1861, 12 Stat. 220, 41 U. S. C. § 5, provides:

SEC. 3709. All purchases and contracts for supplies or services, in any of the departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. * * *

The more specific provisions, which govern the making of contracts for Army supplies, are contained in Title 10 of the United States Code as §§ 1191–1225. The provisions of §§ 1200 and 1201 are as follows:

§ 1200. *Letting contracts for quartermaster supplies; reports to Secretary of War.* All purchases of regular and miscellaneous supplies for the Army furnished by the Quartermaster Corps for immediate use shall be made by the officers of such corps, under direction of the Secretary of War, at the places nearest the points where they are needed, the conditions of cost and quality being equal: *Provided*, That all purchases of said supplies, except in cases otherwise provided for, and except in cases of emergency, which must be at once reported to the Secretary of War for his approval, shall be made by contract after public notice of not less than ten days for small amounts for immediate use, and of not less than from thirty to sixty days whenever, in the opinion of the Secretary of War, the circumstances of the case and conditions of the service shall warrant such extension of time. The award in every case shall be made to the lowest responsible bidder for the best and most suitable article, the right

being reserved to reject any and all bids. (July 5, 1884, c. 217, 23 Stat. 109; Aug. 24, 1912, c. 391, § 3, 37 Stat. 591.)

§ 1201. *Advertisement for proposals; considerations governing letting of contracts.* Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered. (Mar. 2, 1901, c. 803, 31 Stat. 905; June 30, 1902, c. 1328, 32 Stat. 514.)

C. *The Pennsylvania Milk Control Law*

Pertinent provisions of the Pennsylvania Milk Control Law of April 28, 1937, P. L. 417, are as follows:

Section 101. Legislative Purpose.—In the exercise of the police power of the Commonwealth, it is hereby declared that the production, transportation, manufacture, processing, storage, distribution, and sale of milk in the Commonwealth is a business affecting the public health and affected with a public interest, and it is hereby declared that this act shall be and is hereby enacted for the purpose of regulating and controlling the milk industry in this Commonwealth, for the protection of the public health and welfare and for the prevention of fraud.

* * * * * *

Section 103. Definitions; Construction.—The following terms shall be construed in this act to have the following meanings, except in those instances where the context clearly indicates otherwise:

"Commission" means the State agency created by this act, to be known as the "Milk Control Commission."

"Consumer" means any person, other than a milk dealer, who purchases milk for consumption or use.

* * * * *

"Person" includes an individual, corporation, association, partnership, limited partnership, or other unincorporated enterprise owned by two or more individuals.

* * * * *

Section 401. Milk Dealers Required To Be Licensed.—Except as herein otherwise specifically provided, a milk dealer, as defined in this act, shall not buy milk from producers or others within this Commonwealth for storage, manufacture, processing, distribution, or sale within or without this Commonwealth, or sell or distribute milk within this Commonwealth, unless such dealer be duly licensed as herein provided; and it shall be unlawful for a milk dealer to buy milk from, or sell milk to, a milk dealer who is not either licensed or exempted as herein provided, or, in any way, to deal in or handle milk which he has reason to believe has previously been dealt in or handled in violation of the provisions of this act.

* * * * *

Section 404. Grounds for Refusal, Suspension or Revocation.—The commission shall grant a license to an applicant complying with the provisions of this act and

the rules, regulations and orders issued by the commission pursuant thereto. The commission may decline to grant a license to an applicant, or may suspend, revoke or refuse to transfer a license already granted to a milk dealer, or may prohibit a milk dealer exempted from the license requirements of this act from continuing to operate as a milk dealer, after determination by the commission that the dealer:

* * * * *

(10) Has violated any of the provisions of this act, or any of the rules, regulations or orders of the commission, or any stipulation entered into between the said dealer and the commission in the course of any proceeding before the commission;

* * * * *

Section 801. Requisites of Orders Fixing Price of Milk.—The commission shall ascertain, after a hearing in which all interested parties shall be given reasonable opportunity to be heard, the logical and reasonable milk marketing areas within the Commonwealth, shall describe the territorial extent thereof, shall designate such areas by name or number, and shall ascertain and maintain such prices for milk in the respective milk marketing areas as will be most beneficial to the public interest, best protect the milk industry of the Commonwealth and insure a sufficient quantity of pure and wholesome milk to inhabitants of the Commonwealth, having special regard to the health and welfare of children residing therein.

The commission shall base all prices upon all conditions affecting the milk industry in each milk marketing area, in-

cluding the amount necessary to yield a reasonable return to the producer and to the milk dealer.

The commission shall file at its office, with each order issued, a general statement in writing of the findings of fact in support of, and the reasons for, such order.

The commission may, upon its own motion or upon application in writing, from time to time, alter, revise or amend an official order defining milk marketing areas or fixing prices to be charged or paid for milk. Before making, revising or amending any order defining milk marketing areas or fixing prices to be charged or paid for milk, the commission shall hold a hearing, after giving reasonable notice thereof to interested persons, of whom the commission has notice, and, in the case of any order affecting the public, after giving reasonable notice thereof to the public in such newspaper or newspapers as, in the judgment of the commission, shall afford sufficient notice and publicity: Provided, however, That upon application in writing from a person aggrieved by an order of the commission hereunder, filed within fifteen (15) days after the issuance of the order complained of, or upon its own motion, the commission may, within twenty (20) days after the effective date of such order, issue an order revising or amending such order without a further hearing, if such revision or amendment is based on the record of the hearing held prior to the issuance of such order.

Every order made pursuant to this article, and any revision or amendment thereof, in which the commission fixes or changes the price of milk to producers or

to consumers, or both, shall be subject to the approval of the Governor.

Section 802. Wholesale and Retail Prices.—The commission shall fix, by official order (except as hereinafter provided in this section), the minimum wholesale and retail prices, and may fix, by official order, the maximum wholesale and retail prices, to be charged for milk sold within any milk-marketing area of the Commonwealth, wheresoever produced, including milk sold by:

(1) Milk dealers to other milk dealers;

(2) Milk dealers to consumers;

(3) Milk dealers to stores, either for consumption on the premises or resale to consumers;

(4) Stores to consumers, except for consumption on the premises where sold.

Nothing herein contained shall be construed to empower the commission to fix the price at which milk may be sold by any milk dealer or producer to consumers for consumption on the premises of such milk dealer or producer.

* * * * * *

Section 803. Prices to Producers.—The commission shall fix, by official order, the minimum prices to be paid by milk dealers to producers for milk: Provided, however, That the fixing of prices to be paid by milk dealers to producers for milk to be used solely in manufacturing shall be discretionary with the commission.

Section 804. Classification.—When, pursuant to any statute or regulations or orders adopted thereunder, or any ordinance or reasonable trade practive, vari-

ous grades of milk are specified, orders of the commission fixing minimum or maximum prices may be applicable to each grade. Orders of the commission fixing minimum or maximum prices may vary in different markets, and shall designate the markets to which applicable. Such orders may likewise classify milk and milk dealers in any reasonable manner which the commission deems advisable, and may vary according to the classes to which they are applicable. The orders of the commission with respect to the minimum prices to be paid to producers and others shall apply to the area in which the milk is produced, or to the area in which the milk so produced is sold, and may vary in different areas according to varying uses, grades and conditions. Each such order may classify such milk by forms, classes, grade or uses, as the commission may deem advisable, and may specify the minimum prices therefor. Other reasonable methods of classification may be prescribed by the commission.

Section 805. Price Increases.—It is hereby declared to be the legislative intent that the benefits of any increase of prices received by milk dealers, by virtue of the minimum price provisions of this article, shall be given to producers, except in any case where the commission deems a deviation from this policy necessary in order lawfully to maintain proper milk markets and outlets for producers and consumers. The commission shall, whenever it deems such action necessary, issue orders, rules or regulations to effectuate this intent.

* * * * *

Section 807. Violations—After the commission shall have fixed prices to be charged or paid for milk, whether by class, grade, use or otherwise, it shall be unlawful for a milk dealer or producer to sell or buy, or offer to sell or buy, milk at any price below the minimum price or above the maximum price applicable to the particular transaction.

No method or device shall be lawful whereby milk is bought or sold, or offered to be bought or sold, at a price less than the minimum price applicable to the particular transaction, whether by any discount, premium, rebate, free service, advertising allowance, or extension of credit, or by a combined price for such milk, together with another commodity or a service which is less, or is represented to be less, than the aggregate of the price of the milk and the price or value of such commodity or service when sold or offered for sale separately or otherwise.

Purdon's Penna. Stat. Ann. (1930), Title 31, provides in part:

§ 700j-1001. Summary offenses.

Except as otherwise specially provided in this act, any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made, shall for each offense, upon conviction thereof in a summary proceeding, be sentenced to pay the costs of prosecution and a fine of not less than twenty-five dollars ($25.00) nor more than three hundred dollars ($300.00), and, in default thereof, to undergo imprisonment of not less than ten (10) days nor more than thirty (30) days. (1937, April 28, P. L. 417, art. X, § 1001.)

§ 700j–1002. Misdemeanors.

For a third or subsequent offense, any person violating any provision of this act, or any rule, regulation or order of the commission lawfully made, shall be guilty of a misdemeanor and shall, upon conviction thereof, be sentenced to pay a fine of not less than five hundred dollars ($500.00) nor more than one thousand dollars ($1,000.00), or to undergo imprisonment not exceeding one (1) year, or both, in the discretion of the court. (1937, April 28, P. L. 417, art. X, § 1002.)

U. S. GOVERNMENT PRINTING OFFICE: 1942